Supreme Court, U. S.
FILED
MAR 19 1975
MICHAEL RODAK, JR., CLERK

No. 73-1869

In the Supreme Court of the United States

OCTOBER TERM, 1974

PETER H. BEER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (J.S. App. 1a–72a) is reported at 374 F. Supp. 363.

JURISDICTION

The judgment of the district court (J.S. App. 73a–74a) was entered on March 15, 1974. A notice of appeal (J.S. App. 75a–76a) was filed on April 5, 1974. This Court noted probable jurisdiction on October 15, 1974.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) [of this title] * * * are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *.

QUESTION PRESENTED

Whether the district court properly determined that appellants had failed to establish that a redistricting plan proposed for councilmanic elections in the City of New Orleans, Louisiana, will not have the effect of denying or abridging the right to vote on account of race or color.

STATEMENT

This is an appeal from the denial by the district court of a declaratory judgment sought by members

of the City Council of New Orleans, Louisiana, pursuant to Section 5 of the Voting Rights Act of 1965, *supra,* to permit implementation of a redistricting plan proposed by the City. The court denied the relief requested because it found that the redistricting would unlawfully dilute the voting capabilities of black voters.

The New Orleans City Council is a seven-member body, two of whom are elected at-large and five by single-member districts dividing the City (Pl. Ex. 4; New Orleans Charter, 3–102, 3–103).[1] On March 2, 1972, the Council, complying with a charter provision requiring the reapportionment of councilmanic districts following the decennial census of the United States, adopted Ordinance No. 4796 M.C.S. ("Plan I"), which redivided the city into five new councilmanic districts.[2]

Because Louisiana and its political subdivisions are covered by Sections 4 and 5 of the 1965 Voting Rights Act (see 30 Fed. Reg. 9897), a change in voting procedures such as that provided for in Plan I may not be implemented before it has been subjected to federal scrutiny (J.S. App. 30a). This may be accomplished in either of two ways: (1) the state or subdivision involved may institute an action for a declaratory judgment in the United States District Court for the

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[1] Plaintiff-Appellants' exhibits are cited as "Pl. Ex." and Defendant-Appellees' exhibits are cited as "Def. Ex."

[2] A map of the districts specified in Plan I appears at App. 623.

Under all of the redistricting plans considered by the Council, the election of two council members on an at-large basis would have been continued.

District of Columbia, and may implement the change in voting procedures if the court finds that the voting change "does not have the purpose and will not have the effect" of unlawfully denying or abridging voting rights; alternatively, (2) the state or subdivision may submit the proposed change to the Attorney General of the United States, and may implement such change if the Attorney General does not interpose an objection. If the Attorney General does object, the proposed change in voting procedures may still be made the subject of an action for a declaratory judgment in the United States District Court for the District of Columbia and implemented if ultimately declared to be lawful in purpose and effect. 42 U.S.C. 1973c.

In the present case, the City chose to submit Plan I to the Attorney General (J.S. App. 7a), rather than to bring an action for a declaratory judgment. By letter dated January 15, 1973, the Attorney General objected to that plan on several grounds, concluding that its proposed councilmanic districts (J.S. App. 7a, n. 26):

> are drawn in a manner which appears to dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts.

On May 3, 1973, the City Council adopted Ordinance No. 5154 M.C.S. ("Plan II"), which is the subject of this litigation, and submitted the amended plan to the Attorney General. By letter dated July 9, 1973, the Attorney General also objected to Plan II, stating in part that the boundary lines specified in Plan II "appear to effect a dilution of black voting strength in the same manner as did the boundary lines pre-

scribed in [Plan I]" and noting that Plan II "combines a number of black voters with a larger number of white voters in four of the five [councilmanic] districts" (J.S. App. 9a–10a, n. 33). The Attorney General's letter of July 9, 1973, also specifically criticized the use of predominantly north-south districts in both plans that had been submitted (*id.* at 10a, n. 33):

> Our evaluation of Ordinance numbers 4796 and 5154 indicates that the objectionable dilution of black voting strength in both redistricting plans is primarily attributable to the vertical [*i.e.*, north-south] shape of the submitted districts. Because the predominantly black neighborhoods in the city are located generally in an east to west progression, the vertical districts in the submitted plans divided the black neighborhoods and combined them with white areas in the north and the south of the city resulting in districts with more white than black voters.

After receipt of this letter, six of the seven council members filed suit in the United States District Court for the District of Columbia, pursuant to the provisions of Section 5 of the Voting Rights Act (42 U.S.C. 1973c), seeking a declaratory judgment that Plan II neither has the purpose nor would have the effect of denying or abridging voting rights on the basis of race. A three-judge court was convened, as required by Section 5, and hearings were held on August 9–10 and October 17–18, 1973 (J.S. App. 12a–13a). On March 15, 1974, the district court denied appellants' request for a declaratory judgment per

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mitting implementation of Plan II (J.S. App. 1a–74a).[3]

After discussing the evolution of Plan II (J.S. App. 13a–22a) and the historical background of the Voting Rights Act in general and Sections 4 and 5 in particular (*id.* at 22a–37a), the district court made detailed findings concerning the prospective operation of Plan II on minority voting strength in New Orleans.[4] The court found that residential segregation by race still prevails in New Orleans and that New Orleans' black population is concentrated in an east-west belt through the center city, with contiguous white residential areas to the north and south (see App. 620). Consequently, the use of predominantly north-south redistricting lines such as those specified in Plan II tends to create voting districts controlled by white voters (J.S. App. 38a).[5]

[3] The district court had earlier denied a petition filed by several *amici*. *Beer* v. *United States*, 374 F. Supp. 357 (D.D.C.). The issue there raised by the *amici* is not encompassed in the present appeal.

[4] Appellants do not challenge the accuracy of these findings, contending instead that the court misconstrued the applicable law in denying their request for a declaratory judgment (*e.g.*, App. Br. 10–11, 31).

[5] At the hearing before the district court, the government introduced a map of the City showing the locations of registered voters by race (Def. Ex. 1) and an acetate overlay (Def. Ex. 5) showing the district boundaries of Plan II. Viewed together, these exhibits reveal that the north-south boundaries utilized in Plan II produce four districts into which the black population belt located in the center city would be divided, and that each of these districts also includes a portion of the white residential areas adjoining the river to the south and the lakefront to the north (App. 620). Indeed, the City official responsible for directing the drafting of reapportionment plans for the City acknowledged that vertical lines tend to create majority white voting districts (*id.* at 236).

In this context, the court examined the impact of Plan II on minority voting rights in the City, using as referents both the percentage of registered voters who are black and the percentage of black persons in the City's total population. The court found that the five single-member councilmanic voting districts proposed in Plan II would have the following racial characteristics (J.S. App. 39a; see also App. 624):

District	Population			Registered voters		
	Total	Black	Percent black	Total	Black	Percent black
A	117,901	36,665	29.1	57,387	12,964	22.6
B	118,678	76,109	64.1	39,870	20,976	52.6
C	119,023	42,651	35.8	49,756	11,606	23.3
D	118,337	51,447	43.5	49,505	18,223	36.8
E	119,532	60,437	50.6	45,898	19,819	43.2
Total	593,471	267,308	45.0	242,416	83,588	34.5

Thus, although black persons comprise 34.5 percent of the registered voters in New Orleans and 45.0 percent of the City's population, under Plan II they would represent a majority of the registered voters—and then by a slight margin—in only one of the City's five councilmanic districts.

In assessing the significance of these statistics, the court examined several aspects of the voting history and electoral process under which Plan II would operate. The court found that New Orleans is char-

acterized by racial bloc voting (*id.* at 18a–19a, 45a)[6] and that black candidates, in recent efforts for city-wide office, have been successful only where they "were recipients of support from white organizations or white candidates" (*id.* at 17a, footnotes omitted).

Moreover, the nomination process in New Orleans includes both a majority-vote requirement and an anti-singleshot limitation (J.S. App. 19a, 38a–39a). The former means that if a candidate, in any election involving more than two candidates, receives only a plurality, the top two candidates are required to run against each other for the nomination (*ibid.*). The anti-singleshot limitation makes impossible the concentration of minority-group votes in favor of a particular candidate in the at-large elections since all ballots containing votes for fewer than the total number of positions available are disqualified (J.S. App. 20a, 38a–39a). The court found that these features of the candidate-nomination process, when viewed in light of New Orleans' long history of racial bloc voting and racial discrimination generally, effectively preclude the election of black candidates in any councilmanic district in which black persons do not comprise the majority of the registered voters—and ensure that both of the at-large positions on the Council will be filled by white candidates (J.S. App. 66a).

[6] Evidence of racial bloc voting is found throughout the hearing record, in the form of statistics (see Def. Exs. 14, 28, 32, 33, 34) and direct testimony (see App. 545–546).

Accordingly, the district court concluded that under Plan II black persons in New Orleans could hope at most to elect one of the seven Council members (J.S. App. 46a, 54a). The court held that this result constituted a "drastic" dilution of the voting strength of black persons, whether viewed from the perspective of the percentage of all registered voters who are black or of the percentage of black persons in New Orleans' total population (J.S. App. 44a). Given the fact of racial bloc voting, black persons—who, as noted above, comprise 34.5 percent of the registered voters in New Orleans—could expect as a theoretical matter to elect between two and three Council members. Since black persons make up 45 percent of the City's total population, moreover, they could, if registered in proportions roughly similar to white persons, expect to elect between three and four council members (*id.* at 45a–47a).[7] The court found the under-registration of black persons in New Orleans to be attributable in large part to the City's long history of racial discrimination—in public schools, public assemblies, public recreational facilities, public transportation, housing, employment and, perhaps most importantly, voting (J.S. App. 16a–17a, 57a–62a).[8]

[7] But see n. 19, *infra*.

[8] The history of legislative efforts in Louisiana to keep black citizens away from the polls was discussed by this Court in *Louisiana* v. *United States*, 380 U.S. 145, 147–150. These efforts have included use of a grandfather clause, a so-called "interpretation test," enactment of a law limiting participation in primary elections to white citizens, and the use of a statewide system of committees—whose work was directed by a committee of the Louisiana Legislature known as the Segregation Com-

After thus finding that Plan II would dilute the voting strength of black persons, the district court considered the justifications offered by the City for the plan (J.S. App. 47a–53a).[9] The City's purported justifications included reliance on ward and precinct lines[10] and on natural and man-made boundaries, all of which, the City suggested, mandated the north-south direction of the district boundaries provided for in Plan II.[11] The court found that these justifications were not sufficient to warrant the dilutive effect of Plan II on the voting potential of black persons within the City (J.S. App. 51a).[12] In reaching this conclusion, the court stated that the City's purported justifications did not satisfy the compelling state interest standard—particularly since the "curtailment of the black vote [caused by the plan was] to considerably less than half of its potential, if indeed not a complete negation of its potential" and other redistricting schemes without such a drastic racial effect had not been demonstrated to be infeasible (J.S. App. 53a; 64a).[13] Alternatively, the court held that the City had not offered any justification for Plan II sufficiently substantial to justify "dilution of the vote * * * on the scale indicated here" (J.S. App. 53a).

mittee—dedicated to the preservation of white social and political supremacy. This history of voting discrimination is reflected here in the fact that no black person has ever been elected to the New Orleans City Council (J.S. App. 17a, 62a).

[9] Because of its finding that Plan II would have a racially discriminatory effect, the court did not reach the contention that the plan was also racially discriminatory in purpose (J.S. App. 40a–42a).

[10] Ward lines are historical boundaries no longer used as election boundaries for city officials. In addition, the court noted that because of "one-man, one-vote" requirements all parties had stipulated that ward lines could not be followed. For this and other reasons, the court discounted professed reliance on ward lines (J.S. App. 49a–50a, n. 219).

[11] The court specifically stated (J.S. App. 38a, n. 161) that it was not invalidating all plans drawn on a north-south basis, nor holding that only an east-west plan would satisfy Section 5. It was only speaking to, and rejecting, the specific plan before it.

[12] Contrary to appellants' assertion, the district court did not require that any reapportionment plan ensure "maximal potential black voting strength" (App. Br. 31). Rather, the court specifically noted that a minority group is not entitled to "'an apportionment structure designed to maximize its political advantage'" (J.S. App. 47a). The court did state, however, that racial minorities are entitled to protection against being "enveloped in a structure which will necessarily minimize [their] potential for meaningful access to the political process" (*ibid.*).

[13] The district court also noted that the continued existence of the two at-large seats, part of the New Orleans councilmanic arrangement since 1954, exacerbated the dilutive effect of Plan II. The court found that, given the history of racial bloc voting and the fact that black voters were in the minority citywide, the two at-large seats were "the expectancy of the white vote" (J.S. App. 66a). Appellants do not here contest this finding.

SUMMARY OF ARGUMENT

In considering appellants' request for a declaratory judgment to permit implementation of Plan II, the district court properly held that dilution of voting strength on a racial basis is encompassed within the "denying or abridging the right to vote" standard of Section 5 of the Voting Rights Act. The determination of whether a particular voting change would have such a proscribed effect necessarily involves, as recognized by the district court, an inquiry into the social and political context in which the plan would

operate and an ultimate assessment of the plan's impact on the access of minority-group members to the political process.

In applying these principles in the present case, the court found first that the councilmanic districts provided for in Plan II would put black voters in the minority in four of the five proposed councilmanic districts. The court further found that black-supported candidates, largely because of New Orleans' long history of racial bloc voting, could realistically hope to be elected to the Council only in the single district under the plan in which blacks would be a majority of the registered voters. Plan II would leave undisturbed the present arrangement of electing two council members on an at-large basis, and the court found that these two seats would remain "the expectancy" of white voters.

The court did not base its ultimate finding of the dilutive effect of Plan II solely upon a statistical assessment. Rather, the court considered a variety of obstacles to full participation by blacks in the political process in New Orleans and ultimately concluded, we submit correctly, that Plan II would result in a sufficiently severe dilution of the voting strength of black citizens in the City to require justification by the appellants.

The court then subjected the justifications for Plan II offered by the City to careful scrutiny, in light of the magnitude of the plan's dilutive effect. The court found that reasonable alternatives for redistricting that would not entail the substantial dilutive ef-

fect of Plan II would have equally satisfied the guidelines proposed by the City as justifications. In view of this and its other findings, which are fully supported by the evidence, the court's denial of a declaratory judgment approving Plan II was correct.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DETERMINED THAT PLAN II WOULD SUBSTANTIALLY DILUTE THE VOTING STRENGTH AND POTENTIAL OF BLACK CITIZENS OF NEW ORLEANS

A. IN DETERMINING THE EFFECT OF PLAN II, THE COURT PROPERLY CONSIDERED THE PLAN'S DILUTIVE EFFECTS IN THE CONTEXT IN WHICH THE PLAN WOULD OPERATE

In analyzing the effect of Plan II, the district court first correctly recognized that "dilution" of the vote is encompassed within the "denying or abridging the right to vote" standard of Section 5 (*e.g.*, J.S. App. 33a–34a). As this Court stated in *Georgia* v. *United States*, 411 U.S. 526, in holding the Georgia reapportionment plan there at issue to be subject to Section 5 review, "the question * * * is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5" (*id.* at 534), and the Court answered both parts of this question affirmatively (*id.* at 534, 535). Indeed, the Court has consistently held that Section 5 is concerned with changes in voting procedures that have the potential for "dilution of voting power." See *Perkins* v. *Matthews*, 400 U.S. 379, 390; *Fairley* v. *Patterson*,

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393 U.S. 544, 569. And there is indication that, in reenacting Section 5 in 1970 with the intention that it would apply to the redistricting changes to be necessitated by the combined effects of the 1970 census and this Court's reapportionment decisions, Congress was specifically concerned about the possibility that redistricting could be used as a means of diluting black voting strength.[14]

[14] As early as 1968 the United States Civil Rights Commission had reported to Congress, after an 18-month study of the operation of the Voting Rights Act, that "[i]n areas where [minority] registration has increased, we have moved into a new phase of the problem [of disenfranchisement]. Political boundaries have been changed in an effort to dilute the newly gained voting strength of Negroes." *Political Participation*, A Report of the United States Commission on Civil Rights, p. 177 (1968).

The Civil Rights Commission's finding concerning the prevalence of the use of redistricting measures to dilute black voting strength was prominently and repeatedly referred to during the Senate and House hearings held in 1969 and 1970 in connection with Congress' extension of the Voting Rights Act (*e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 5538, and Similar Proposals, 91st Cong., 1st Sess., pp. 3–4 (statement of Rep. McCulloch); *id.* at p. 17 (testimony of Howard Glickstein, Acting Staff Director, United States Commission on Civil Rights); *id.* at p. 150 (testimony of Thomas E. Harris, Associate General Counsel, AFL–CIO); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Amendments to the Voting Rights Act of 1965, 91st Cong., 1st and 2d Sess., p. 47 (testimony of Frankie Freeman, Member, United States Commission on Civil Rights); *id.* at p. 132 (testimony of Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); *id.* at p. 427 (statement of Howard Glickstein); *id.* at p. 518 (testimony of David Norman, Deputy Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice)). The connection between redistricting and the dilution of black voting strength was also discussed in both Houses during the floor debates preceding reenactment of the Voting Rights Act (*e.g.*, 115 Cong. Rec. 38486 (remarks of Rep. McCulloch); 116 Cong. Rec. 5520–5521, 5527 (statement of joint views of Senators Bayh, Burdick, Cook, Dodd, Fong, Hart, Kennedy, Mathias, Scott, Tydings); 116 Cong. Rec. 6358 (remarks of Senator Bayh)).

In determining the question of dilution, the district court in the present case explicitly recognized that a proposed change in voting procedures does not require justification merely because it does not maximize minority-group voting strength (J.S. App. 47a) and held that the governing standard is, instead, "equality of opportunity" under the plan (J.S. App. 37a)—the right of the group not to "be enveloped in a structure which will necessarily minimize its potential for meaningful access to the political process" (J.S. App. 47a). This Court adopted a similar standard in upholding a constitutional challenge to multi-member legislative districts because of their dilutive effects on minority voting potential in *White* v. *Regester*, 412 U.S. 755, 766, stating in the context of that constitutional case:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis*, [403 U.S.] at 149–150.

Although this standard has thus far been utilized by this Court only in determining whether dilution was

caused by multimember districts, it was properly relied upon by the district court here (with due regard to the shift in the burden of proof in the present statutory context). As the Court of Appeals for the Fifth Circuit put it, in analyzing a constitutional challenge to a single-member district reapportionment plan (*Howard* v. *Adams County Board of Supervisors*, 453 F. 2d 455, 458, n. 2),

> [w]hile the "dilution" test developed in *Burns* [v. *Richardson*, 384 U.S. 73], and expanded in *Whitcomb*, is used in those cases to test the constitutionality of multimember district plans, we have no hesitation in applying that test as a measure of the constitutionality of reapportionment plans involving only single-member districts. In each instance, we are required to determine the same question, whether or not there has been an unconstitutional manipulation of electoral district boundaries so as to minimize or dilute the voting strength of a minority class or interest.[15]

Appellants appear to contend that the principles emanating from these constitutional decisions do not apply to the statutory review of changes in voting procedures under Section 5 (Br. 14–17). They argue that Section 5 review is, instead, limited to a determination of the effects of the proposed voting change "by itself," ignoring the "social, economic and political context" in which the plan will operate (Br. 16).

[15] See also *Robinson* v. *Commissioners Court of Anderson County*, 505 F. 2d 674 (C.A. 5); *Moore* v. *Leflore County Board of Election Commissioners*, 502 F. 2d 621, 624 (C.A. 5).

However, as this Court recognized in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308–315, the Voting Rights Act of 1965 was passed specifically to enforce the Fifteenth Amendment, on the basis of an informed congressional judgment that previous judicial and legislative efforts to secure Fifteenth Amendment rights had been insufficient. Section 5 "suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment." 383 U.S. at 334. And the granting of a declaratory judgment under Section 5 is, effectively, a determination that "continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment." *Id.* at 335.

Accordingly, the issuance of a declaratory judgment under Section 5 necessarily implicates constitutional standards.[16] A mere determination that any denial or abridgement of voting rights under the changed procedure would be no worse than that under the pre-

[16] Denial of a declaratory judgment, however, need not be based on a finding that the proposed plan would be unconstitutional since the burden of proof is on the State to show that its changed procedure meets the statutory requirements (see *Georgia* v. *United States*, *supra*, 411 U.S. at 538). Moreover, both the Attorney General and the Deputy Assistant Attorney General in charge of the Civil Rights Division testified during the 1970 hearings leading to the Act's reenactment that Section 5 also expands the substantive prohibition of the Fifteenth Amendment for prophylactic purposes. See Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 5538, and Similar Proposals, 91st. Cong., 1st. Sess., at p. 280; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Amendments to the Voting Rights Act of 1965, 91st. Cong., 1st. and 2d Sess., at pp. 189–190, 240, 507, 536.

existing procedure obviously would not satisfy the congressional purpose to enforce the Fifteenth Amendment. What is required, instead, is a realistic inquiry into the effects the proposed plan would have in actual operation in order to determine that the statutory and constitutional rights are vindicated—the kind of inquiry sanctioned by this Court in *Whitcomb* v. *Chavis, supra,* and *White* v. *Regester, supra,* where, as here, dilution of voting strength was the issue.[17] Indeed, any lesser standard for granting a declaratory judgment under Section 5 would permit approval of new election procedures under that section which would be vulnerable to subsequent challenge under the Fifteenth Amendment—a result obviously contrary to the prophylactic purpose of Section 5. See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 308, 309, 335, 337.

In short, "Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters." *Georgia* v. *United States, supra,* 411 U.S. at 531.[18]

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[17] *Whitcomb* and *White* are in this respect no more than a particular application of the principle that a statute racially neutral on its face may be challenged as racially discriminatory in application. See, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356.

[18] See, also, *Perkins* v. *Matthews*, 400 U.S. 379, 390; *Allen* v. *State Board of Elections*, 393 U.S. 544, 548; *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 308, 315; *City of Petersburg, Virginia* v. *United States*, 354 F. Supp. 1021, 1027 (D.D.C.), affirmed, 410 U.S. 962; cf. *Burns* v. *Richardson*, 384 U.S. 73, 83.

B. THE EVIDENCE SUPPORTED THE DISTRICT COURT'S FINDING THAT PLAN II WOULD SUBSTANTIALLY DILUTE THE VOTING STRENGTH AND POTENTIAL OF BLACK CITIZENS

The district court examined the probable effect of Plan II in light of the detailed evidence developed in the four-day hearing in this case. As a starting point, the court found that Plan II would fragment the black vote in New Orleans so that black persons would be in the majority, and then only slightly, in but one of the five proposed councilmanic districts (*e.g.*, J.S. App. 39a-40a). The court also found that New Orleans' long history of racial bloc voting, reinforced as late as 1964 by state legislation (see pp. 22–23, *infra*), and Louisiana's majority vote requirement would continue to operate as a practical matter to defeat black-supported candidates in any district in which blacks do not comprise a majority of the registered voters (J.S. App. 45a–46a). Under Plan II, then, at least four of the five redistricted council seats would be controlled by New Orleans' white majority (J.S. App. 46a). Moreover, the cumulative effect of racial bloc voting and the continued enforcement of majority-vote requirements and an anti-single-shot limitation would, as a practical matter, ensure that the two at-large seats would remain "the expectancy of the white vote" (J.S. App. 66a). In a city in which 34.5 percent of the registered voters are black, therefore, the overall effect of Plan II would

be to give black voters realistic access—at most—to one of the seven (14 percent) council seats.[19]

The court did not, however, base its ultimate findings merely on these statistics. Rather, it assessed their significance in light of the residual effects of the long history of racial discrimination in voting and other fields in Louisiana (J.S. App. 16a, 57a–60a) and the court's related finding that city office holders in New Orleans have generally been unresponsive to the

[19] In addition to the single councilmanic district (District B) in which black persons would comprise a slight majority (52.6 percent) of the registered voters, the court also found that under Plan II blacks would account for approximately one-half (50.6 percent) of the population of a second district (District E) (J.S. App. 39a). This does not mean, however, that a black-supported candidate would have a realistic chance of being elected to the City Council from District E given the prevalence of bloc voting—even in the absence of under-registration of black persons living in District E. As of the 1970 census, the proportion of the black population of New Orleans of voting age (267,308—total black population; 152,650—black voting age population; 57.1 percent—percentage of black population of voting age) was substantially below the proportion of the white population of voting age (326,163—total white population; 236,597—white voting age population; 72.5 percent—percentage of white population of voting age). See *The Voting Rights Act: Ten Years After*, A Report of the United States Commission on Civil Rights, 368 (1975); App. 624. If these voting-age percentages are applied to the population mix of District E, they reveal that blacks would comprise only about 44.5 percent of the voting age population of that district—even though they account for just over one-half of the total population (App. 624).

"wishes and wants of the black minority" (J.S. App. 18a; see *id.* at 63a).[20]

The court noted, for example, that until very recently participation by black citizens in councilmanic elections in New Orleans was limited by a variety of legal obstacles—including requirements that persons seeking to register submit strict proof of residency of specified duration and the confinement of registration to one location (City Hall) (J.S. App. 16a). And it was not until the present suit was filed that city registrars made any concerted efforts to reach out into New Orleans' black community to facilitate the registration of black persons (J.S. App. 16a, n. 65). The tactics that have been employed throughout Louisiana, including New Orleans, "with phenomenal success to keep Negroes from voting in the State" were summarized in *Louisiana* v. *United States, supra,* 380 U.S. at 147–150, and significantly inform the findings made by the district court (and previously by the Attorney General) in this case. See *White* v. *Regester, supra,* 412 U.S. at 765–770.

The court also found that the access of black persons in New Orleans to the political process is further

[20] The court's determination, accordingly, was not based on any notion that minority-group members are entitled to be represented in legislative councils by a proportional number of members of their own race. See, *e.g.*, *Whitcomb* v. *Chavis, supra*, 403 U.S. at 152–155.

limited by the candidate-selection methods currently used. Victory in the Democratic primary in New Orleans is generally tantamount to victory in the general election (J.S. App. 19a, n. 73). As a rule, however, black persons seeking to run in the Democratic primary have not been included in mayoral tickets headed by white candidates (see *id.* at 17a). Indeed, black candidates have been elected to citywide office in New Orleans only on the rare occasions when a black candidate was individually supported by a white organization in the City or by white candidates (*ibid.*). The inability of individual black candidates to form successful alliances with white candidates endorsed by the existing "white political power structure" has without exception proved fatal because it has impeded their efforts to gain citywide exposure (*ibid.*).

The court's findings indicate, moreover, that racial bloc voting is perhaps even stronger in New Orleans than is allegiance to the Democratic Party. The court found that "the only notable exception" to Democratic Party allegiance in recent years occurred in a state legislative race in which a black candidate had won the Democratic primary and was defeated in the general election by a Republican because of cross-over vote from traditionally Democratic white wards in the City (J.S. App. 19a, n. 73). Indeed, racial bloc voting in New Orleans was encouraged, until 1964, by the Louisiana statute declared unconstitutional in *Anderson* v. *Martin,* 375 U.S. 399, which required the Louisiana Secretary of State to print, in parentheses, the race of each candidate "[o]n the ballots to be used

in any state or local primary, general or special election * * *" (375 U.S. at 400, n. 1).

We submit that all of these factors, viewed together, amply support the district court's finding that Plan II would result in a sufficiently severe dilution of the voting strength of black citizens of New Orleans to require justification by the appellants. Indeed, remarkably similar considerations were deemed by this Court in *White* v. *Regester, supra,* 412 U.S. at 766–767, 769–770, to justify a finding that dilution of minority voting strength resulting from multi-member districting was unconstitutionally discriminatory. See, also, *Moore* v. *Leflore County Board of Election Commissioners,* 502 F. 2d 621, 627 (C.A. 5).

II

APPELLANTS' JUSTIFICATIONS FOR PLAN II WERE INSUFFICIENT TO WARRANT THE PLAN'S SUBSTANTIAL DILUTION OF MINORITY VOTING STRENGTH

Following its finding of dilution of black voting strength the district court examined in detail the City's justifications for Plan II, stating that the City's burden is to satisfy "the high standard" of the compelling interest test (J.S. App. 52a) and concluding that the City had not offered justifications sufficiently substantial to warrant "dilution of the vote * * * on the scale indicated here" (J.S. App. 53a). Appellants contend that they need show only a "rational basis" for the Plan (Br. 22–26), and assert that their justifications, in the form of "guidelines" to those respon-

sible for drafting the plan (set forth at pp. 28–29 of their brief), satisfy this test.

This contention ignores the fact that a Section 5 proceeding entails an inquiry made to insure preservation of Fifteenth Amendment rights (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 355)—an inquiry made in the implementation of legislation designed to insure that "millions of nonwhite Americans will now be able to participate for the first time on an equal basis in the government under which they live" (*id.* at 337).

This Court has consistently demanded a high standard of justification for state laws or procedures which curtail or diminish constitutionally protected rights (see, *e.g., Korematsu* v. *United States,* 323 U.S. 214, *Loving* v. *Virginia,* 388 U.S. 1; *McLaughlin* v. *Florida,* 379 U.S. 184; *Anderson* v. *Martin,* 375 U.S. 399) and, of course, the Fifteenth Amendment specifically prohibits denial or abridgement of voting rights on a racial basis, whether accomplished directly or indirectly (see, *e.g., Lane* v. *Wilson,* 307 U.S. 268).[21] Accordingly, even though Plan II would not amount to an absolute denial of the black citizen's right to

[21] Appellants' contention that a reapportionment plan reviewed under Section 5 must be upheld if supported by "reasonable" or "legitimate" state interests relies on cases stemming from *Reynolds* v. *Sims,* 377 U.S. 533 (see Br. at 22). The cases cited by appellants, however, did not involve any allegation that voting rights were being abridged on a racial basis (see, *e.g., Abate* v. *Mundt,* 403 U.S. 182, 184, n. 2; *Mahan* v. *Howell,* 410 U.S. 315, 318, n. 5), but were instead concerned with allegations of deviations from the "one-man, one-vote" standard of the Fourteenth Amendment.

vote and there was no finding of racial purpose, a "searching judicial scrutiny" was appropriate because the plan's dilutive effects would "impinge upon constitutionally protected rights." *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 40; see *id.* at 37–38.

Thus, regardless of whether the appellants' burden here was best characterized by the "compelling state interest" standard, the district court, after finding that the plan would substantially dilute black voting strength, correctly subjected appellants' justifications for the plan to careful scrutiny. In this context, we submit, that scrutiny should balance the magnitude of the plan's dilutive effects (in light of the importance of the rights protected by the Fifteenth Amendment and by Section 5) against the non-racial justifications offered for the plan. Unless those justifications show that the reasons supporting the particular plan[22] outweigh its dilutive effects, the plan should be rejected.[23]

[22] Appellants dispute the district court's statement that, were any justification possible for a voting plan which curtailed minority voting rights, the plaintiff must demonstrate that "nothing but [the plan] proposed * * * was feasible" (J.S. App. 53a). However, this statement merely acknowledges the principle that, when a State attempts to justify action which curtails constitutional rights, it must choose the least restrictive alternative, or the course of action with the least effect on those rights. See, *e.g., Dunn* v. *Blumstein,* 405 U.S. 330, 343; *Sherbert* v. *Verner,* 374 U.S. 398, 407; *Shelton* v. *Tucker,* 364 U.S. 479, 488.

[23] Under this general approach in those instances of submissions to him under Section 5 which arguably involve some dilution of minority voting strength, the Attorney General has requested that the State or political subdivision come forward

Under this standard, we submit, the district court correctly concluded that "the interests which the City asserts" do not "justify * * * the magnitude" of Plan II's dilution of black voting strength (J.S. App. 53a). The court's findings and the evidence at trial demonstrated in several ways that substantially less dilutive alternatives could satisfy the City's guidelines approximately as well as Plan II. Evidence was presented, for example, that plans in which districts were drawn on an east-west, rather than north-south, basis would comply with most of the city's guidelines. Indeed, the member of the City Council staff primarily responsible for the initial drafting of plans for the Council's consideration testified that he developed two east-west plans with which the staff was satisfied (App. 336–337). Consideration by the Council of such plans would have been one way to avoid the disproportionate number of majority white districts created by Plan II's north-south scheme.[24]

with justifications for the particular reapportionment plan in question. The Attorney General has ultimately not objected to the great majority of proposed reapportionments that have been submitted to him under the Voting Rights Act: from the date of the Act's original enactment through December 31, 1974, some 443 reapportionment plans were submitted to the Attorney General, and he interposed objections under Section 5 to 72 of them (many of which were then revised and approved as resubmitted).

[24] The record suggests that the City's insistence on north-south lines had its genesis in ward boundaries established in 1912 or 1914 (App. 183–184). This fact, plus the concern to preserve insofar as possible the historic boundaries of the districts from at least the last reapportionment in 1961 (*id.* at 176, 200), suggest that the Council did not consider the effect of its actions on those newly enfranchised by the Voting Rights Act of 1965.

Three of the "guidelines" used in drafting Plans I and II [25]—ward and precinct lines, natural boundaries, and man-made boundaries—are relied on by appellants as direct support for adherence to the north-south approach taken. Even before the plans were drafted, however, appellants recognized (see complaint, par. 9; App. 10), that, because of "one-man, one-vote" requirements, ward lines could not be observed (App. 200). As to precinct lines, appellants suggest that because elections for many different offices are tabulated on a voting machine at a single precinct, convenience requires that precincts not be split (App. 122). New Orleans' precincts are not large, however, averaging from 500 to 2,600 voters (App. 188), and a member of the Council's staff acknowledged that precinct lines could be observed by a plan which deviated substantially from the north-south direction of Plan II (App. 575; see also map at App. 626).[26] And the fact that precinct lines could be kept intact reduces to insignificance the need to consider alleged natural boundaries within New Orleans, except to the extent that they divide communities with differing economic or social interests.

However, the community of "economic and social"

[25] The evidence is undisputed that the drafting of Plan II occurred without consideration of the objections raised by the Attorney General with respect to Plan I (App. 351).

[26] Moreover, one of the council members acknowledged that an east-west plan need not be "irregularly shaped" (App. 379), indicating that the guideline of contiguousness and compactness (App. Br. at 29) need not be satisfied solely by adherence to the north-south direction of Plan II.

interests guideline upon which appellants also rely as justifying, in part, the north-south direction of the districts of Plan II was not consistently observed. The Council staff was well aware that one area of the City—that bordering on Lake Pontchartrain—has a common social and economic interest (App. 572); but under Plan II, the lakefront is divided among four districts (see App. 624). Conversely, the Algiers area, which was also recognized as an area with "a community of interest" (App. 572), was in fact divided among three districts by Plan I (see App. 623), but ultimately placed entirely within one district (App. 624). And, most importantly, it is undisputed that Plan II fragments the black community located in the center city—contrary to appellants' purported guideline (App. Br. 28) that the "[r]edistricting should be accomplished without diluting the voting rights of any minority group * * *."[27]

Finally, we note that another guideline actually followed in the drafting of Plan II was to attempt to keep incumbents apart in the new districts (see, *e.g.*, App. 557, 206–207, 344). The Council's Staff Director stated that several councilmen told him of their desire to be kept in districts apart from other incumbents (App. 208), and it was undisputed that given the residences of the members of the Council a plan with north-south districts was necessary to achieve this result (App. 344). The desire to keep incumbents apart, however, though it may have merit in other contexts, is entitled to no weight as a justification for

[27] The evidence indicates, however, that those drafting the plan attempted to maintain a similar racial composition to that in the existing districts (App. 213, 244–246).

abridgement of voting rights. See *Moore* v. *Leflore County Board of Election Commissioners, supra,* 502 F. 2d at 625.

In sum, the district court's conclusion that the guidelines purportedly used by the City in the drafting of Plan II did not justify the plan's severe racially dilutive effect was correct.[28] The guidelines were followed to the extent that they justified the desire to adhere to the existing system as much as possible (partially in order to keep incumbents apart), and ignored to the extent that they could justify, with equal authority, a different zoning plan which would not similarly fragment the black community.

[28] Contrary to appellants' contention (App. Br. 31), the district court correctly held that its determination that Plan II's effect failed to meet the statutory standard made it unnecessary for the court to decide whether Plan II was also racially discriminatory in purpose.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, explicitly provides that political entities covered by Section 4 bear the burden of demonstrating that a proposed change in voting procedures will be racially non-discriminatory both in purpose *and* effect:

"* * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color * * *" (emphasis added).

See *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 565, n. 29; *Perkins* v. *Matthews*, *supra*, 400 U.S. at 387. See, also, Senate Hearings, *supra*, n. 14, at 507. Indeed this Court affirmed the denial by a district court of a request for a declaratory judgment under Section 5 because the proposed voting change had been found to have a racially discriminatory effect—despite an express finding that the change was not discriminatory in purpose. *City of Petersburg, Virginia* v. *United States*, 410 U.S. 962, affirming, 354 F. Supp. 1021 (D. D.C.).

Consequently, whether measured pursuant to a compelling state interest standard or a somewhat less exacting standard, the justifications offered by the City are not of the substantial nature required to condone the effect of Plan II. The severe effect of the dilution found here would require a showing by the appellants of the absence of reasonable alternatives with a lesser racial effect. In the absence of such a showing, and indeed in light of the findings and evidence that such alternatives were in fact available, the declaratory judgment requested below was properly denied.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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MARCH 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975